

FCC MAIL SECTION

Before the
 Nov 9 10 35 AM '99 Federal Communications Commission
 Washington, D.C. 20554

In the Matter of DISPATCHER)
)
 Amendment of Part 2, Subpart K of the)
 Commission's Rules regarding the Importation)
 of Radio Frequency Devices Capable of Causing)
 Harmful Interference)

CI Docket No. 98-69

SECOND REPORT AND ORDER

Adopted: October 29, 1999

Released: November 5, 1999

By the Commission:

I. Introduction

1. In this *Second Report and Order*, we eliminate the requirement for filing an original FCC Form 740 with the Commission when the Form 740 is submitted to the U.S. Customs Service to make the required declaration upon importation of a device capable of causing harmful interference. We also amend the importation rules to clarify language regarding use of radio frequency devices that are imported for export to make the rule more easily enforceable.

II. Background

2. Pursuant to Section 302 of the Communications Act, (47 U.S.C. §302(a)), the Commission has adopted rules for marketing radio frequency (RF) devices. These rules control the importation for sale of devices that have a potential for causing harmful interference by denying entry to those devices that do not comply with FCC technical rules.¹ In 1976, the Commission, in consultation with the U.S. Customs Service, adopted procedures to implement cooperative enforcement of the importation requirements.²

3. The FCC Form 740 is used by importers to declare that imported devices comply with applicable FCC technical requirements.³ In 1991, the Commission revised the importation rules to eliminate unnecessary duplicative reporting and accommodate the U.S. Customs Service's

¹ 47 C.F.R. §§2.801-2.815

² *Report and Order, Amendment of Part 2 With Respect to Importation of Certain Electronic Equipment*, 59 FCC Rcd 2d 1083 (1976). The 1976 *Report and Order* adopted the original importation requirements.

³ 47 C.F.R. § 2.1203(a)

transition to an electronic filing system.⁴ These changes allowed companies to file FCC Form 740 electronically with the U.S. Customs Service. Importers that were unable to file the Form 740 information using U.S. Customs electronic system filed an original FCC Form 740 submission with the FCC, as well as provided a copy of the form with the documentation presented to U.S. Customs.

4. In June 1998, the Commission released an *Order and Notice of Proposed Rule Making (Order and NPRM)*.⁵ The *Order and NPRM* changed the authority to waive the radio frequency importation rules from the Compliance and Information Bureau to the Office of Engineering and Technology (OET), the office that manages the equipment authorization program. The Commission proposed and sought comment on the regulation requiring the submission of the original Form 740 to the Commission when unable to file it electronically with U.S. Customs. The Form 740 would still accompany the documentation presented to the U.S. Customs Service. The Commission also proposed and sought comment concerning amending the rule allowing importation for export of devices. This amendment will address concerns raised by both the U.S. Customs Service and the FCC regarding the difficulty of enforcing this aspect of the FCC importation criteria.

III. Discussion

Form 740 filings

5. The Commission proposed to eliminate the requirement for filing an original FCC Form 740 with the Commission when an importer or consignee is unable to file electronically with U.S. Customs. Efficiency and industry acceptance of the U. S. Custom's electronic filing system provided the basis for this proposal. In 1990, the Commission received 40,000 FCC Form 740 declarations per month.⁶ By July of 1999, the number of filings had decreased to less than 200 per month. By comparison, the U.S. Customs Service receives 80,000 electronic filings per month.⁷ The U.S. Customs Service's electronic filing system currently handles over 99% of the declarations made by importers of RF devices. Compliance related information is available to the Commission via paper filings made as part of the Customs entry process.

6. The Commission received no comments opposing this proposal. Accordingly, the Commission will modify its rules and eliminate the requirement that the FCC Form 740 be filed with the FCC when an importer is unable to do so electronically. FCC Form 740 submissions, however, will continue to be a part of the submission made to the U.S. Customs Service. The dual filing system has provided sufficient time for the electronic system to be successfully deployed and accepted by industry. No additional or unique information is gained by requiring that the original form be filed with the FCC. The FCC will obtain Form 740 information, when needed, from U.S. Customs.

⁴ *Report and Order, Amendment of Part 2 of the Rules Concerning the Importation of Radio Frequency Devices Capable of Causing Harmful Interference*, 6 FCC Rcd 3296 (1991).

⁵ *Order and Notice of Proposed Rule Making*, 13 FCC Rcd 13629 (1998).

⁶ *Id.* at ¶ 5.

⁷ *Id.*

Import for export rule amendment

7. The Commission also sought comment regarding the proposal to amend language in Section 2.1204(a)(5) in order to improve enforcement by prohibiting entry of devices that are not approved for use in the United States. The current rule allows unauthorized devices to be imported. The rule states that "the radio frequency device is being imported solely for export. The device will not be marketed or offered for sale *for use* in the U.S."⁸ (emphasis added). The Commission seeks to remove the words "for use" from the regulation to prevent entities from selling these devices in the U.S. for domestic use under the guise that they will be sold for use outside of the U.S. Many of the devices that are imported in this way are those that the FCC rules deny entry because they present a real source of harmful interference.

8. Some concerns over amending this rule were expressed. GTE Service Corporation (GTE) and Iridium North America (INA) oppose the removal of the language "for use" from the rule. As a provider of global roaming services for cellular telephones, GTE contends that removing the words "for use" will prevent GTE from offering its GlobalRoam® service in its present form. Currently, GTE imports the required foreign-standard equipment and resells it to its affiliates, other cellular carriers, and GTE distributors, who, in turn, rent or sell the handsets to travelers in advance of their traveling abroad.⁹ If equipment intended for foreign use cannot be sold in the United States, GTE contends that cellular carriers will lose the ability to provide customers with a convenient way to procure the foreign-standard cellular handset. As a result, GTE contends the rule change will be costly and inconvenient for cellular customers and put customers and businesses from the United States at a disadvantage when conducting business internationally.

9. GTE also contends that the Commission's concerns with the current rule do not apply to the wireless phones sold for use in the international roaming context. GTE contends that the Commission expressed concerns in the *Order and NPRM* that the current rule creates a loophole by which persons can purchase imported devices for use domestically. Because it knows to whom it is selling the devices and the purpose for which the telephones will be used, GTE "sees no reason why the FCC's proposed solution to the perceived problem should prohibit the sale of imported phones for use in the international roaming context." Thus, GTE believes that the Commission should abandon the rule change or amend the rule to allow GTE and others to continue to import and sell foreign-standard phones intended for use in foreign countries.¹⁰

10. INA raises concerns regarding the rule change and its impact on its business practices, contending that the Commission's specific proposal is far too broad and will cause serious harm to one of INA's planned communications businesses. INA initially notes that the rule change does not apply to its business concerns within the United States because any terrestrial wireless adapter will comply with applicable U.S. standards and licensing requirements. INA notes, however, that it will be prepared to sell or lease a "cellular handset" that will permit a subscriber to use the INA Iridium subscriber unit (ISU) handset to access terrestrial wireless services in a foreign country where the terrestrial wireless standards and spectrum usage are incompatible with U.S. terrestrial wireless systems. While the ISU handset will not be "exported" within the

⁸ 47 C.F.R. § 2.1204(a)(5).

⁹ Comments of GTE Services Corporation, at 2.

¹⁰ GTE comments at 2-5.

meaning of Section 2.1204, the proposed change to Section 2.1204(a)(5) is intended to prohibit importation of an unlicensed radio frequency device that is marketed or offered for sale in the United States, regardless of where it is intended to be used. Thus, INA contends that the proposed language appears to foreclose Iridium's plans for leasing or selling imported cellular handsets intended for and solely capable for use overseas. Iridium maintains that this is obviously not what the Commission intended by the NPRM and the unanticipated result should not be allowed to occur. To remedy this shortcoming, INA proposes alternative language to the rule change. Iridium revision would read as: "... (5) [t]he radio frequency device is being imported solely for export or is inherently capable of functioning only outside the U.S. Except for devices inherently capable of functioning only outside the U.S., no radio frequency device may be marketed or offered for sale in the U.S." INA believes that this language would define a technology-based exception to the broad prohibition the Commission seeks to achieve in the public interest in the NPRM while allowing INA and other authorized entities to pursue telecommunications businesses such as importing and selling cellular handsets to U.S.¹¹

11. The Commission does not seek to impede the efforts of those engaged in business pursuits that do not violate Commission rules. However, we cannot allow those that do violate the rules to continue to undermine organizations that do take the time and effort to insure that their products operate in accordance with our rules. We have reviewed the suggested rule language contained in the record and agree with commenters that the original proposal may impede their business efforts in the telecommunications industry. After giving careful consideration to the proposed language in the record we will amend rule Section 2.1204(a)(5) to read:

(a) Radio frequency devices may be imported only if one or more of these conditions are met:

* * *

The radio frequency device is being imported solely for export. The device will not be marketed or offered for sale in the U.S., except:

- (i) if the device is a foreign standard cellular phone solely capable of functioning outside the U.S.
- or;
- (ii) if the device is a multi-mode wireless handset that has been certified under the Commission's rules and a component (or components) of the handset is a foreign standard cellular phone solely capable of functioning outside the U.S.

This amendment will allow the importation of foreign standard cellular handsets that are incapable of operating in the United States similar to those addressed in GTE's and INA's comments.¹² Wireless telephones that combine standards capable of operating within the United States with foreign standards must continue to abide by the Commission certification rules in

¹¹ Iridium Comments at 2-5.

¹² The rule amendments we adopt here will not adversely affect those companies engaged in selling Global Mobile Personal Communications Satellite (GMPCS) devices. In the *Report and Order concerning the 1998 Biennial Regulatory Review – Amendments of Parts 2, 25, and 68, (GMPCS R&O)* the Commission implements Mutual Recognition Agreements and Arrangements that provide product approval for GMPCS devices on a global basis. ¹³ FCC Rcd 24687 (1998). This rule will allow the products to be imported in accordance with the Commission's amended importation rules.

regard to the portions of the device that function in the United States. Any unauthorized foreign standards utilized in phones cannot function or be operated in the United States at any time.

12. Upon review of the record, including the legitimate concerns expressed by those in the telecommunications industry, we believe that the proposal to amend the rule will close the unintended "loophole" in the current rule. This change also serves the public interest by making the implementation and enforcement of the rule less problematic, and assists the Commission in its goal of preventing the marketing and distribution of illegal devices. Accordingly, we amend rule Section 2.1204(a)(5).

IV. ADMINISTRATIVE MATTERS

A. Final Regulatory Flexibility Act

13. As required by the Regulatory Flexibility Act (RFA),¹³ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Order and Notice of Proposed Rule Making (Order and NPRM)*.¹⁴ The Commission sought written public comment on the proposals in the *Order and NPRM*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.¹⁵

B. Ex Parte Rules -- Permit but Disclose Proceeding

14. This is a permit-but-disclose notice and comment rule making proceeding. Ex parte presentations are permitted except during the sunshine agenda period provided they are disclosed as outlined in the Commission's rules. See generally 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a)

V. ORDERING CLAUSES

15. **ACCORDINGLY, IT IS ORDERED** that, pursuant to the authority contained in Sections 4(i), 4(j), 7(a), 302, 303(b), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 157(a), 302a, 303(b), 303(f), 303(g), 303(r), Part 2, Subpart K, Sections 2.1204(a)(5), 2.1205(a), 47 C.F.R. §§ 2.1204(a)(5) and 2.1205(a) are amended as set forth in Appendix A.

16. **IT IS FURTHER ORDERED**, that this *Second Report and Order* will be effective sixty (60) days after publication of a summary thereof in the Federal Register.

¹³ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

¹⁴ *Supra* note 5.

¹⁵ See 5 U.S.C. § 604.

17. **IT IS FURTHER ORDERED** that a copy of the *Second Report and Order* will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

G. Contacts for Information

18. For further information, contact David Sturdivant, Compliance and Information Bureau (202) 418-1170 or via e-mail to "dsturdiv@fcc.gov".

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, reading "Magalie Roman Salas". The signature is fluid and cursive, with the first name "Magalie" being the most prominent part.

Magalie Roman Salas
Secretary

Attachment

Appendix A

Final Rules

Part 2 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 2 – FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation for Part 2 is amended to read as follows:

AUTHORITY: 47 U.S.C. §§ 154, 302a, 303, and 336, unless otherwise noted.

2. Section 2.1204 is revised by amending paragraph (a)(5) to read as follows:

§ 2.1204 Import Conditions

* * * * *

(a)(5) The radio frequency device is being imported solely for export. The device will not be marketed or offered for sale in the U.S., except:

(i) if the device is a foreign standard cellular phone solely capable of functioning outside the U.S.

or;

(ii) if the device is a multi-mode wireless handset that has been certified under the Commission's rules and a component (or components) of the handset is a foreign standard cellular phone solely capable of functioning outside the U.S.

* * * * *

3. Section 2.1205 is revised by deleting the note and paragraph (a)(1) and redesignating (a) and (a)(2) to a new paragraph (a) to read as follows:

§2.1205 Filing of Required Declaration

Note: [Removed]

(a) For points of entry where electronic filing with Customs has not been implemented, use FCC Form 740 to provide the needed information and declarations. Attach a copy of the completed FCC Form 740 to the Customs entry papers.

§ 2.1205(a)(1) [Removed]

§ 2.1205(a)(2) [Removed]

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Appendix B

Comments

- 1) GTE Service Corporation
- 2) Iridium North America

Appendix C

Final Regulatory Flexibility Act

A. Need for and Objectives of, the Report and Order

19. The Commission is amending Part 2 of the rules to eliminate the filing of the FCC Form 740 with the FCC when an importer is unable to use the electronic filing system operated by U. S. Customs. The form is currently filed with both the U.S Customs Service and the FCC. The form will continue to be filed with the U.S. Customs Service. This action will simplify the importation process and is part of the transition to the electronic filing system used by U.S. Customs.

20. This *Second Report and Order* also amends the Commission rule that unintentionally allows non-compliant radio frequency devices to enter the United States. The current language requires that the Commission show that imported RF devices that do not meet FCC technical rules are imported and sold for use in the United States. Establishing the fact that the item was marketed for use in the United States is problematic. The rule amendment removes a way for allowing devices that normally would be denied entry into the United States due to non-compliance with FCC rules.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

21. No comments were submitted in reference to the IFRA. The Commission does not anticipate any adverse economic impact on small business entities resulting from these rule amendments. The elimination of the duplicative FCC Form 740 filing should reduce the administrative burden on any business affected, particularly small businesses.

C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

22. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.¹⁶ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organizations," and "small governmental jurisdiction".¹⁷ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.¹⁸ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).¹⁹ The Commission will need to receive

¹⁶ 5 U.S.C. § 603(b)(3).

¹⁷ *Id.*; 5 U.S.C. § 601(6).

¹⁸ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register. 5 U.S.C. § 601(3).

¹⁹ Small Business Act, 15 U.S.C. § 632 (1996).

more data regarding the brokers who currently file FCC Form 740 with the Commission, rather than filing them electronically through the U.S. Customs Service (Customs). We estimate that 200 of these forms are filed per month, presumably by smaller firms that do not subscribe to the Customs electronic filing system due to the relatively small number of FCC declarations that they handle. While there is no readily apparent link between the number of paper filings per month and the number of entities submitting the declarations, we presume most of the entities involved are small businesses or individuals. These entities will continue to be subject to the requirement to submit FCC Form 740 documents, but only to one government agency, not two. They will address and mail only one FCC Form 740 per declaration, not two, thereby reducing their mailing cost by at least half. Other administrative costs, such as staff time required to duplicate the FCC Form 740, will also be significantly reduced.

D. Description of Projected Reporting, Record Keeping, and Other Compliance Requirements

23. There is no new requirement. The *Second Report and Order* removes the requirement to file a copy of FCC Form 740 with the Commission for entities that do not use U.S. Customs's electronic filing procedures. Entities that do not use electronic filing will continue to provide an original FCC Form 740 to U.S. Customs with the shipment, but will not be required to file a second copy with the FCC.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

24. This *Second Report and Order* will reduce the burden on small entities. This item eliminates the duplicative filing of the FCC Form 740 and, as a result, should reduce administrative overhead, such as processing and mailing costs for small businesses.

Report to Congress: The Commission will send a copy of the *Second Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Second Report and Order*, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Second Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).